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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 816

CITY OF MILWAUKEE; J. J. KRUEGER, CITY TREASURER OF THE CITY OF MILWAUKEE; COUNTY OF MILWAUKEE; AND C. M. SOMMERS, COUNTY TREASURER OF MILWAUKEE COUNTY,

Petitioners,

vs.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

WALTER J. MATTISON,
City Attorney.
OMAR T. McMAHON,
Assistant City Attorney.
801 City Hall,
Milwaukee 2, Wisconsin,
Counsel for Petitioners, City of Milwaukee and J. J. Krueger.

JAMES J. KERWIN,
District Attorney.
OLIVER L. O'BOYLE,
Corporation Counsel.
C. STANLEY PERRY,
Asst. Corporation Counsel.
901 North 9th Street,
Milwaukee 3, Wisconsin,
Counsel for Petitioners, County of Milwaukee and C. M. Sommers.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Petitioners,

vs.

UNITED STATES OF AMERICA AND FEDERAL PUBLIC HOUSING AUTHORITY,

Respondents.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION FOR WRIT OF CERTIORARI.

The petitioners above named respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a judgment of that court entered January 20, 1944. The certified copy of transcript of record in the case, including the proceedings of the Circuit Court of Appeals, has been filed herewith in accordance with **Rule 38 of this Court.**

History of the Litigation.

The suit was instituted by the respondents in the United States District Court for the Eastern District of Wisconsin to enjoin petitioners from assessing, levying and collecting general ad valorem taxes upon the Federally-owned Parklawn low-cost housing premises located in the City and County of Milwaukee; to have the 1941 taxes (before District Court judgment 1942 taxes were levied) declared null and void; and for declaration that the lands are exempt from taxation while owned by the Government.

The cause was heard upon motions of the parties for judgment on the pleadings. The District Court in written opinion (T. R. 37-42), 49 Fed. Supp. 436, ordered judgment in favor of respondents, which was duly entered (T. R. 42-43).

Upon appeal the Circuit Court of Appeals affirmed such judgment January 20, 1944 (T. R. 61-65).

The petitioners now seek to have reviewed by this court the novel and undeniably important questions of law involved.

Jurisdiction.

Jurisdiction of this court is invoked pursuant to Section 240 (a) of the Judicial Code as amended by Act of Congress of February 13, 1925 (U. S. C. A., Title 28, Sec. 347), and Rule 38, 5(b) in that the courts below decided an important question of Federal law which has not been, but should be, settled by this court, and that there is drawn in question the validity of a Wisconsin Statute, Section 70.11 (1), as amended by Chapter 86, Laws of Wisconsin for 1941, which by its terms took away from the United States exemption from taxation for improved residential income-producing property, and the courts below held such 1941 amendment to be repugnant to the United States Constitution.

Statement of the Matter Involved.

This is a case of first impression. This court has never expressly passed upon the tax immunity of a rental income-producing public low-cost housing project in respect to which the United States and one of its instrumentalities acts as a landlord in a proprietary capacity and receives from tenants annual rentals of approximately $135,000 and offers to the State, County and City $6,970 per annum in lieu of general real estate taxes on the 40-acre tract and improvements levied at approximately $44,066 for the city and $23,591.95 for the county, as per 1941 and 1942 assessments and levies.

By reason of motions of all parties for judgments in their respective favor, the material facts are all admitted and undisputed.

The United States acquired title to the Parklawn premises in 1935. Dwelling houses to accommodate 518 families were constructed and completed ready for occupancy about September 1, 1937; after the enactment of the 1941 amendment to the Wisconsin Statutes the local taxing authorities assessed and levied taxes for the city and county in the respective sums above mentioned. The petitioners demanded payment of the taxes and assert that the taxes were valid and enforceable. The project was established pursuant to the General Welfare Clause of the United States Constitution and certain provisions of the National Industrial Recovery Act approved June 6, 1933, as amended June 29, 1936, with funds appropriated by Congress, Title 40, Chap. 8, Secs. 421 to 423, U. S. C. A. (49 Stat. 2026); the lands were purchased by the United States in 10 separate parcels from the then owners, private individuals or corporations that for many prior years had paid the taxes (T. R. 5, 23-24).

The Government does not have any public office and never performed on the premises a governmental function, excepting only as the local manager handled the renting of the houses to tenants; the houses have been almost fully occupied by rent-paying tenants since 1937; among the residents are several hundred minors aged 4 to 19 who attend the public schools of the city erected and maintained at the expense of the local taxpayers; no school has ever been erected on the premises by the Government; the city operates and maintains numerous services for the benefit of the owners of real estate and all residents within the city by laying out, maintenance and repair of streets and alleys; sewage disposal; other sanitary, public health, hospital and clinic services; fire and police protection; garbage collection and disposal; and public educational and other services, at an annual cost as applied to Parklawn lands and residents alone of about $130,000, derived from general taxes, special taxes, state and county aids, license and permit fees, and other sources; the Government pays the city only for the water service (T. R. 6, 24-25).

The county furnishes services by way of administration of justice and law enforcement, maintaining courts of record, public institutions for the care of the mentally handicapped and orphaned minors, general and emergency hospitals and clinics for the treatment of ill and injured persons unable to pay for the same, by way of support of the unemployables and unemployed, by maintenance of public park and recreational facilities, and other substantial services for which the county annually expends large sums of money derived from the levy of general taxes.

The state renders numerous services for the benefit of all real estate and all residents in the state by maintaining public educational, penal, hospital, sanitarium, judicial, law enforcement and other institutions, and in the administration of the state government, and expends annually large

sums of money therefor, derived in part from the state-wide general tax levies; and the state and county annually contribute substantial sums of money to the city, derived from state income and gasoline taxes and other sources, for the support of the city schools and city government.

The United States and its Housing Authority became a landlord and engaged in business for gain and profit and competes with the taxpaying private owners of rented and rentable apartment and other dwelling houses. The Parklawn dwellings are not needful buildings as mentioned in Section 8 of Art. I, U. S. Const.

The Government never owned and never contemplated owning, in Wisconsin or elsewhere, at the time of the adoption of the U. S. Const., or at any time thereafter up to about 1933, nor in 1846 to 1848, at the time of admission of Wisconsin into the Union, and the adoption of the Wisconsin Const., any residential income-producing real estate similar to Parklawn.

Up to May 9, 1941, Section 70.11 Wis. Statutes, provided exemption from taxation for property "owned exclusively by the United States." Effective May 9, 1941, this exemption statute was amended by Chapter 86 of the Laws of 1941, so as to repeal the exemption provision as related to Federally-owned residential income-producing property.

In 1941 the Parklawn lands were assessed at $139,000 and the improvements at $1,623,500. The 1941 taxes were unpaid within the time prescribed by the statutes and the City Home Rule charter ordinance applicable, and the city became the owner of the tax sale certificates for the city taxes, and the county in due time became the owner of the tax sale certificates for the county taxes (T. R. 9, 10, 28).

The Federal authorities prior to the acquisition of the lands and the construction of the dwellings, never applied for or received from the Governor of Wisconsin pursuant

to Section 1.03 Wisconsin Statutes, a certificate of consent, and no such certificate was ever issued (T. R. 14, 32).

The petitioners set up as an alternative defense that the respondents should be denied the equitable relief they seek unless and until the Federal agency administering the property enters into an agreement with the state, county and city for the payment, in lieu of taxes, of a fair, reasonable and adequate sum of money, in reasonable proportion to and based upon the costs of the public and municipal services supplied for the benefit of the Parklawn premises and tenants; that no such agreement was ever made; and that in negotiating for such agreement the Housing Administrator under date of March 29, 1938, made an offer to the city alone (T. R. 21-22, 34-46), to pay to the state, county and city in lieu of taxes, the sums of $1,109 for 1937 and $6,970 per annum for the four succeeding years, such amounts to be divided among them as they should agree; and on September 28, 1940, the Housing Administrator renewed said offer without increasing the amounts; and the city declined to accept such offer; and the petitioners asserted that said offers were wholly inadequate, unreasonable, arbitrary and not in keeping with the provisions and intent of the Federal statute applicable (T. R. 15, 32-33). Petitioners further asserted that the Federal authorities were obliged to do equity, failed to do equity, and therefore should be denied any equitable or other relief as demanded in their complaint.

Pending the trial in the District Court the petitioners in 1942 made similar assessments and levies on the Parklawn premises. These 1942 taxes were likewise held invalid by the courts below.

Questions Presented.

1. Whether the Wisconsin taxation exemption statute as amended in 1941 is unconstitutional as applied to United States-owned income-producing real estate administered for the Government by its Federal Public Housing Authority in a proprietary capacity for gain and profit, in the absence of state consent to acquisition and exclusive federal legislation?

2. Whether the offer of the Federal authorities to pay the annual sums in lieu of taxes was so unfair, unreasonable, inadequate, inequitable and not in keeping with the Federal statute applicable, as to constitute a mere arbitrary offer, and be grounds for the denial of the equitable relief sought by respondents?

Reasons Relied On for the Allowance of the Writ.

This controversy presents serious questions, not merely affecting the parties hereto and the particular premises involved, but also important to all the several states and local municipalities. The courts below have relied upon the decision of *M'Culloch* v. *Maryland, et al.*, 4 Wheat. 316, wherein taxation on income-producing real estate was not involved; and on *Van Brocklin* v. *Anderson, et al.*, 117 U. S. 151 (Tenn. 1886), where likewise taxes on income-producing real estate were not involved. *M'Culloch* v. *Maryland* left open the question of taxation on government-owned real estate. The rule in *Van Brocklin* v. *Anderson* is founded upon the supremacy clause of the U. S. Constitution, Art. VI, which holding we respectfully request this court to reconsider.

It is true that *Van Brocklin* v. *Anderson* has stood for the general constitutional provision of tax immunity of United States-owned lands, regardless of the nature or use

thereof or state consent thereto for over 50 years. Petitioners contend, however, that if the United States is to have unconditional tax immunity, it must be grounded upon the separate provision of the U. S. Constitution relating to the acquisition of lands by the U. S. Government in the several states, Art. I, Sec. 8, which provides for exclusive legislation by Congress over its lands only upon the condition precedent that the United States shall have acquired consent of the state legislature.

So far as we can discover, the real meaning of the phrase "exclusive legislation" as used in that constitutional provision as related to real estate taxation, has never been clarified by this court or the inferior courts of the United States. The petitioners contend that this "exclusive legislation" power includes the power to enact tax immunity statutes only when the lands are acquired with consent of the state. The Government contends that Congress has the tax immunity power under the supremacy clause and that the Government in order to have tax immunity on its lands need not have prior state consent and the "exclusive legislation" power under Art. VI.

Petitioners contend further that the United States does not have tax immunity even by a liberal construction of the supremacy clause and that the exclusive legislation power with consent of the state is the express power which limits the United States and is the controlling constitutional provision in the premises.

The *Van Brocklin case* has been cited with approval many times and recently, but in none of such cases was the landlord proprietary capacity for gain and profit element present. The cases cited by respondents holding that the Government has tax immunity under the supremacy clause, in which the *Van Brocklin* decision is cited as authority therefor, involved taxes sought to be imposed by the several

states on United States Bank shares, Federal Land Bank stock, U. S. Bonds, Home Loan Mortgages and as Sales Taxes, and in the latter type of cases the United States court decisions are not wholly uniform.

The law on tax immunity, we respectfully submit, should be settled by this court for rental, income-producing housing projects, because the United States has recently established numerous such housing projects in the several states and it may continue to do so in the future.

If the *Van Brocklin* decision is unsupported by a proper construction of the constitutional provisions applicable, it should not be permitted to stand further as an invasion of the sovereign rights of the several states in which the United States has built or will build similar income-producing enterprises in respect to which the state legislatures are unwilling to grant tax exemption.

The absence of an authoritative final decision of this court on this issue of tax immunity and the resulting confusion in the minds of the Federal authorities on the one hand, and state and local municipal authorities on the other hand, require clarification of this important issue so that Federal, State and local authorities can be guided accordingly.

While Wisconsin may at this time be the only state which has enacted a statute making Federal housing property taxable, the enactment of such a statute may be under consideration in other states and the clarification of the constitutional law involved will be helpful to all concerned.

While the United States will present its own side of this controversy to this court, perhaps by brief in opposition to this petition, it seems to us that the United States authorities should be glad to have this issue settled finally by this court so that they may be governed accordingly in deter-

mining whether or not to continue in or embark further upon Federal housing projects.

The decisions of the courts below both state rather plainly that the brief of the petitioners made an appealing and persuasive argument in support of their contention that the United States could not have tax immunity without state consent. Apparently there was, as there should be, hesitation on the part of these lower courts to overrule *Van Brocklin* v. *Anderson*, or to distinguish that case from the case at bar. It may well be, however, that if the *Van Brocklin* decision had not been made, these lower courts would have held with the petitioners in this case.

The District Court held that the amount of the offer in lieu of taxes was solely for determination by the Public Housing Authority and the amount of the offer, even though very small, was beyond the interference of the court, and further that there was not in the record sufficient evidence upon which it could pass upon the adequacy or inadequacy of the offer. Petitioners contend that the undisputed facts applicable constituted ample evidence upon which the court could pass upon that issue.

The Circuit Court of Appeals on that issue held the authority of the administrator was permissive only and his failure to make more than an arbitrary offer "in lieu of taxes" should not prohibit the injunctional relief.

Petitioners contend further that Congress in the statute relating to payments "in lieu of taxes" intended a fair, reasonable, adequate, equitable sum and not a mere nominal and arbitrary sum.

While the case at bar is an action for declaratory relief, it is also and predominantly an action for equitable relief, and the Government must do equity to obtain equity, and it ought not to have the relief it seeks and the relief the courts below gave it, unless and until in keeping with the

statute in question, it does equity by offering a fair, adequate and reasonable sum.

The question as to whether the United States must do equity and to what extent it must do equity in acting under a statute like the one in question has not, so far as we are aware, been passed upon by this court; the decisions we have been able to find coming entirely from inferior Federal courts and State courts.

WHEREFORE, it is respectfully prayed that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of the courts below may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as may be just and proper; and your petitioners will ever so pray.

Dated at Milwaukee, Wisconsin, this 20th day of March, 1944.

Respectfully submitted,

CITY OF MILWAUKEE and
J. J. KRUEGER,
Petitioners.
By WALTER J. MATTISON,
City Attorney.
OMAR T. McMAHON,
Asst. City Attorney.
801 City Hall,
Milwaukee 2, Wisconsin.

COUNTY OF MILWAUKEE and
C. M. SOMMERS,
Petitioners.
By JAMES J. KERWIN,
District Attorney.
OLIVER L. O'BOYLE,
Corporation Counsel.
C. STANLEY PERRY,
Asst. Corp. Counsel.
901 North 9th Street,
Milwaukee 3, Wisconsin.